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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 544

LILLIAN HELLEN REEVES, ELIZABETH HELLEN MARTIN and CLARENCE COWLES HELLEN,
Petitioners,

v.

AMERICAN SECURITY & TRUST COMPANY, Trustees for GEORGE HELLEN, REENE TOUTANT BEAUREGARD, JOHN DOUGLAS BEAUREGARD, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

S. WALLACE DEMPSEY,
BRUCE FULLER,
Attorneys for Petitioners,
723 Investment Building,
Washington, D. C.

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AMERICAN SECURITY & TRUST COMPANY, Trustees for GEORGE HELLEN, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

The Petitioners, Lillian Hellen Reeves, Elizabeth Hellen Martin, and Clarence Cowles Hellen, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled cause on August 8, 1940.

Opinions Below.

The opinion of the District Court of the United States for the District of Columbia (R. 14-19), is not reported, and

the opinion of the United States Court of Appeals for the District of Columbia (R. 29-34) is not yet reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on August 8, 1940. A Petition for a Re-hearing was denied on September 27, 1940. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The questions at issue are whether the decision of the Court below is in conflict with the decisions of other Circuit Courts of Appeals, or in conflict with applicable local or Maryland applicable decisions, or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in the following respects, viz,

In holding, contrary to the intention of testator to devise the remainder in the real property in question, (which intention is expressly declared by testator immediately preceding such devise; R. 5) and contrary to the terms of the clause making such devise (R. 5, 6), that testator's intention must be disregarded, and the devise be held invalid because of punctuation claimed to be faulty, and of six isolated and ambiguous words "if George dies before his father", unnecessary for the declared purpose of testator, and in conflict with the result he sought to accomplish (R. 5, 6).

Statement.

The testator died January 21, 1867, leaving seven sons and one daughter. His will duly executed in 1866 was probated in the District of Columbia in 1867, and was in his own handwriting. He first declared that he intended to dispose of his Worldly estate. (R. 2.) He disposed of his property substantially as follows: (1) All his improved and productive realty, except the home place, the proceeds from sale of unimproved realty, and his stocks, bonds and notes were devised in trust to pay specified annuities to his widow, all his sons except Walter, and two other persons. (R. 2-5.) He then declared "I devise all my real estate, in Washington City, that is improved * * * as follows * * *,—" (2) Subject to the trusts, his improved realty was devised in specific life estates with remainders to the eldest sons living at the death of the life tenants, and without such sons then remainders over to all his children except Walter. (R. 5-8.) (3) Various specific gifts were made to testator's wife and his descendants. (4) "The residue of my estate, on the extinction of the trusts, if Walter Hellen, my son, be alive, and has reformed, shall, one half thereof, be paid to him, and the balance shall be divided among such of my other sons, as may then be alive." (R. 8.)

The property involved and the clause in dispute come under "(2)" above in which he devised his improved realty, and is as follows,—

> "I devise all my real estate, * * * that is improved * * * as follows, * * *. I devise unto my son Frank Hellen and Dr. Seth I. Todd, in trust * * * part of lot 8, in Square 457, with the warehouse thereon, * * * on 7th Street, * * * to lease the houses * * *, and collect the rents during the lifetime of my son Clifton Hellen, and apply the same * * *, to the * * *, support of Clifton's two sons, George Hellen and Ben Hellen, * * *

> and * * * of his family, * * * free * * * from his * * * debts, * * *
> After the death of my son Clifton, I devise the lot and warehouse on 7th Street, to his son George for life, if he be then living, remainder in fee to any eldest son George may have living, at the time of his death, if George dies before his father, without such son, then remainder in fee to my son Frank." (R. 5, 6.)

Testator made his will in 1866 (R. 8), when his grandson, George Hellen was three years of age. (R. 12.) Clifton Hellen died seven years after testator's death. (R. 12.) George survived his father Clifton, and died without issue. The 7th Street property was sold pursuant to a decree of the lower Court in 1922, and the proceeds were held in trust for George. (R. 9, 10.) Petitioners are the children of Frank Hellen, who survived testator. (R. 16.)

The trustee, the American Security & Trust Company, brought this proceeding for construction of the will; to determine to whom it should distribute these proceeds after the death of George Hellen, the life tenant. (R. 9, 11.)

Judgments Below.

The District Court held that these proceeds should be distributed to the heirs of the residuary legatees. (R. 19.) The Court of Appeals affirmed the decision of the District Court. (R. 29-34.)

Specification of Errors to be Urged.

Petitioners urge that the Court of Appeals erred:

(1) In holding that by said clause of his will (R. 5-6) testator devised the remainder in said improved realty to

his son Frank only if George died before his father, and without a son, and that the devise to Frank became invalid because George survived his father. (R. 31.)

(2) In failing and refusing to hold that testator's primary intent as declared by him by the clause in question, (R. 5) and as shown by the will as a whole, (R. 2-8) was to devise said property by the clause in question to his son, Frank, if George did not have a son, (R. 5, 6) and that this primary intent should be given effect.

(3) In holding that "somewhere in the above quoted provision", (the last sentence of the clause under construction; R. 6), "a period or a semicolon should have been inserted instead of a comma. The dispute is over where that period belongs." (R. 30.)

(4) In holding that any ambiguity raised by the conflicting theories of punctuation should be resolved in favor of the preferred taker, (R. 31) George's son, and, as George never had a son (R. 10) and his rights are not involved, in failing and refusing to hold that any ambiguity should be resolved in favor of Frank over the residuary legatees.

(5) In holding that the devise did not conflict with the rule against perpetuities because it was based on the life of George alone, (R. 32) and in ignoring the life of Clifton.

(6) In holding that the circumstance that testa[illegible]ed the six ambiguous words in this clause alone, and that they are not present in any of the other ten clauses indicates that their use was not inadvertent but expresses a deliberated intent. (R. 32.)

(7) In holding that "OR" should not be interpolated between "father" and "without." (R. 32.)

(8) In holding that if the devise of the remainder failed it passed under the residuary clause, (R. 33) and in failing and refusing to hold that the remainder vested in petitioners.

(9) In holding by implication and construction that the remainder was a reversion. (R. 33.)

(10) In holding that testator did not prefer that the remainder go to Frank rather than to the residuary "legatees". (R. 33.)

(11) In affirming the decision of the lower Court. (R. 34.)

Reasons for Granting the Writ.

(1) The decision (R. 29-34) gives no weight whatever to the declared intention of the testator to devise the remainder to Frank unless a great grandson was born, or to the like intent as shown by the devise itself (R. 5, 6), or by the confining the residuary clause to the bequest of personalty (R. 8), or by the will as a whole (R. 2-8), and is, in this respect, in conflict with the decisions of this Court, previous decisions of the Court below, and the Maryland decisions which were applicable in 1867, when testator died, and with the rule as laid down by the Textbooks, that the Court should ascertain and give effect to the testator's intention. (Smith v. Bell, 6 Pet. 68, 8 L. ed. 322; Evans v. Ockershausen, 100 F. (2d) 695, 700, 69 App. D. C. 285; Gerke v. Colonial Trust Co., 114 Md., 289, 295; Thompson on Wills, (2nd Ed.) §213, p. 275;

1 Page on Wills, (2nd Ed.) §806, ps. 1359, 1360; Miller on the Construction of Wills, §9, p. 40,—Miller is constantly relied on by the Maryland Court of Appeals in will cases.)

(2) The decision of said Court of Appeals in failing and refusing to hold that Testator's primary intent, (as declared by him, and as shown by the clause in question, and as shown by the will as a whole), was to devise said property *by the clause in question* to his son, Frank, if George did not have a son, (R. 2-8,) is in conflict with the decisions of this Court and of the Court below, and of the Maryland Court of Appeals, and with the Rule laid down by the Textbooks, that the primary intent is to control any subordinate or minor intent. (Smith v. Bell, 6 Pet. 68, 8 L. ed. 322; Coltman v. Moore, 1 MacArthur, 8 (D. C.) 197; Slingluff v. Johns, 87 Md. 273, 277; Thompson on Wills, §215, p. 277, §218, p. 281, §224, p. 291; 1 Page on Wills, (2nd Ed.) §812, p. 1378; Miller on Construction of Wills, §17, p. 69.)

(3) The decision of said Court of Appeals that "the dispute is over where that period belongs" (R. 30) in the last sentence of the clause under construction (R. 6) is in conflict with the Rule that "giving to punctuation a controlling force in construction of wills has never been recognized by law", and with the decision of the Maryland Court of Appeals, and the Rule as laid down by the Textbooks. Here testator's devise is invalidated by changing his comma to a period and placing the period by conjecture. (Black v. Herring, 79 Md. 146, 149; Miller on Construction of Wills, §20, p. 79; Thompson on Wills, §229, p. 300.)

(4) The decision of said Court of Appeals in holding that the unborn great grandson is the preferred taker as

against Frank, a favorite son, (R. 31) (which is not in issue) and in failing to hold that Frank is a preferred taker as against the Residuary Legatees, is in conflict with the decisions of this Court and of the Court below, and of the Court of Appeals of Maryland, and with the doctrine laid down by the Textbooks. (Walker v. Parker, 13 Pet. 166, 10 L. ed. 109; Wright v. Denn *ex dem.* Page 10 of Wheat, 204, 6 L. ed. 303; Rizer v. Perry, 58 Md. 112, 119; Thompson on Wills, §222, ps. 286, 287; Miller on Construction of Wills, §98, ps. 263 to 265; 1 Page on Wills, (2nd Ed.) §817, ps. 1388, 1389.)

(5) The decision of said Court of Appeals that there would be no conflict with the law as against perpetuities, through devising two life estates preceding the remainder, because the period of suspension was the life of George alone, (R. 32) (whereas if Clifton outlived George, the suspension would be for two lives), is in conflict with the Rule against perpetuities, and with the decisions of Maryland, which are controlling here. (Barnes' Heirs v. Barnes *et al.*, (3 Cranch C. C. 269) 2 Federal Cases No. 1014, p. 855; See also 48 C. J. §4, p. 937.)

(6) The decision of said Court of Appeals that the circumstance that the six words "if George dies before his father" (R. 6) are present in the clause being construed and not in the other ten clauses devising improved real estate (R. 5-8), indicate that this was not inadvertent but expresses a deliberated intent (R. 32) is the direct opposite of the Rule that a single instance of the use of language may be interpreted by reference to several other cases where like devises or bequests are made and interpreted in accordance with the form of these other devises and bequests, and is in conflict with such Rule. (Cook v. Homes,

11 Mass. 528; Kemp v. Sutton, 233 Mich. 249; Williams v. Best, 195 N. C. 324; *In Re* Tillinghass Action, 25 R. I. 338.)

(7) Said Court of Appeals decision in holding that "OR" should not be interpolated between "father" and "without" (R. 6) to sustain the remainder (R. 32) is in conflict with the decisions of this Court, and the Court of Appeals of Maryland, and the Rule established by the Textbooks. (Travers v. Reinhardt, 205 U. S. 423, 51 L. ed. 865; Thompson on Wills, §227, p. 296; 2 Schouler on Wills, 6th Ed. §874, ps. 996, 997; 1 Jarman on Wills, 5th Ed., III, p. 576; Roome v. Phillips, 24 N. Y. 463, 470; Miller on Constr. of Wills, §32, p. 99; Janney v. Sprigg, 7 Gill. 197, 202-203; Slingluff v. Johns, 87 Md. 273, 280.)

(8) Said Court of Appeals decision that if the remainder to Frank failed, it passed under the residuary clause (R. 33, 8), is in conflict with the decisions of the Court of Appeals of Maryland, and with other decisions of the Court below, and with the Rule as laid down by the Textbooks. (Tongues' Lessee v. Nutwell, 13 Md. Rpts. 415, 427, 428; Chilcoate v. Reid, 140 A. 100, 154 Md. 378; George Washington University v. Riggs National Bank, 88 F. (2d) 771, 774, 66 App. D. C. 389, 391; Thompson on Wills, §494, 584; Miller on Constr. of Wills, §159, p. 422.)

(9) The decision of said Court of Appeals in holding by implication and construction that the remainder was a reversion (R. 33) is in conflict with the facts, and with the decisions of this Court, and with the Rule as laid down by the Textbooks. (Doe v. Considine, 6 Wall. 458; Thompson on Wills, §231, p. 203.)

(10) The decision of said Court of Appeals that testator did not prefer the remainder to go to Frank rather than to the residuary "legatees" (R. 33) is in conflict with the terms of the will (R. 5-8), and with the decisions of this Court and of the Court of Appeals of Maryland, and the doctrine laid down in the Textbooks. (Walker v. Parker, 13 Pet. 166, 10 L. ed. 109; Wright v. Denn *ex dem.* Page 10 of Wheat. 204, 6 L. ed. 303; Rizer v. Perry, 58 Md. 112, 119; Thompson on Wills, §222, ps. 286, 287; Miller on Constr. of Wills, §98, ps. 263 to 265, §13, p. 55; 1 Page on Wills, (2nd Ed.) §817, ps. 1388, 1389.)

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the District Court of the United States for the District of Columbia (R. 14-19), is not reported, and the opinion of the United States Court of Appeals for the District of Columbia (R. 29-34) is not yet reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on August 8, 1940. A Petition for a Re-hearing was denied on September 27, 1940. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented, Specifications of Errors to be Urged, Etc.

A statement of the questions presented, specifications of errors to be urged, and a statement of the case will be found in the foregoing petition.

ARGUMENT.

I.

The Court below failed to give any weight whatever to the expressed intent of the testator to devise the remainder by the clause in question. (Specification of Errors* No. 2.)

The clause in question reads as follows:

> "*I devise all my real estate,* * * * *that is improved* * * * *as follows,* * * *. I devise unto my son Frank Hellen and Dr. Seth I. Todd, in trust * * * part of lot 8, in Square 457, with the warehouse thereon, * * * on 7th Street, * * * during the lifetime of my son Clifton Hellen, and apply the same * * *, to the * * * support of Clifton's two sons, George Hellen and Ben Hellen, * * * and * * * his family, * * * free * * * from his * * * debts, * * *.
>
> After the death of my son Clifton, I devise the lot and warehouse on 7th Street, to his son George for life, if he be then living, remainder in fee to any eldest son George may have living, at the time of his death, if George dies before this father, without such son, then remainder in fee to my son Frank."

The evidences of testator's intention to devise the remainder are the following:

(1) He declared in the opening sentence of his will his intention to dispose of his estate,—meaning all of it; (R. 2.)

(2) In a separate portion of his will he disposes by eleven clauses all of his improved real property (R. 5-8), and he precedes these eleven clauses by the declaration,

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(* Specification of Errors hereinafter designated as "E".)

which applies to each of the eleven devises separately, including the devise in question here, as follows:

"I DEVISE ALL MY REAL ESTATE * * * THAT IS IMPROVED, * * * AS FOLLOWS"; (R. 5.)

(3) By the clause in controversy, he provides that the remainder shall go either to Frank or to the unborn great grandson (R. 6).

(4) By each of the ten other clauses devising his improved real estate, he imposes only the single condition against the living remainderman, that there shall not be an eldest son of the life tenant living at the latter's death; (R. 5-8.)

(5) The language he uses in creating the residuary clause is such as to include personalty only. (R. .)

From each of these circumstances, it is plain that testator intended to devise the remainder, and from the form of the residuary clause, it is equally plain that he believed that he had devised it. Courts endeavor to discover the intent, and when found give it effect. Here, the intent is both declared and shown by the will as a whole, to devise the remainder to either Frank or if he was born to an imaginary great grandson. The latter was never born and the intention of the testator can, therefore, be given effect only by holding the devise to Frank valid. The failure to give it effect is in conflict with the decisions of this Court, the Maryland decisions, other decisions of the Court below, and the Textbooks. (Smith v. Bell, 6 Pet. 68, 8 L. ed. 322; Evans v. Ockershausen 100 F. (2d) 695, 700, 69 App. D. C. 285; Gerke v. Colonial Trust Co., 114 Md. 289, 295; Thompson on Wills (2nd Ed.) §213, p. 275;

1 Page on Wills, (2nd Ed.) §806, ps. 1359, 1360; Miller on Constr. of Wills, §9. p. 40.)

The area of the District of Columbia was ceded to the United States by Maryland, and Congress by Act approved in 1801 adopted the Maryland laws for the District, (2 U. S. Statutes at Large, ps. 102 to 105 incl.), and the Maryland laws continued in force in the District until March 3, 1901. (Mar. 4, 1929 Code, Sec. 30, p. 418). The decisions of the Maryland Courts up to March 3, 1901, are, since testator died in 1867, controlling. (De Vaughn v. Hutchinson, 165 U. S. 566, 569, 570; Thompson on Wills, 2nd Ed., §87, p. 116.)

II.

The Court below erroneously determined that the devise in question was invalid on the ground that a period should be substituted for a comma, and by deciding by conjecture where the period should be placed. (E. 3; R. 31.)

The Court below held:

> "Somewhere in the above-quoted provision a period (or a semi-colon) should have been inserted instead of a comma. The dispute is over where that period belongs." (R. 30.)

(The provision is quoted immediately under the heading of Point I hereinabove.)

The Court decided that the period should be placed after the word "death" and before the word "if". (R. 30, 31.)

(a) *"Giving to punctuation a controlling force in construction of wills has never been recognized by law." (Black v. Herring,* 79 Md. 146, 149; *Miller on Constr. of Wills,* §20, 79; *Thompson on Wills,* §229, p. 300.)

(b, 1) *In determining whether the devise was valid by making its own punctuation,* (R. 30, 31), *the Court was obliged to act on conjecture, whereas its obligation was "not to indulge in conjecture however strong." (Miller on Constr. of Wills,* §10, p. 46; *Shapiro v. Howard,* 113 Md. 360, 370; *Wright v. Denn, ex dem,* 10 *Wheat.* 204, 246, 6 L. ed. 303).

(b, 2) *The conjecture that the period should be placed between "father" and "without" has fully as substantial a basis as the Court's conjecture that it should be placed between "death" and "if".* (R. 30-31, 32.)

The Court says that in the other clauses a period should follow the word "death" and precede its succeeding "if" clause, and, therefore, it should be put in the same place in this clause (R. 32.) The argument is based on the juxtaposition of the two words "death" and the word "if" preceding the words "no such son" or the equivalent of this phrase. In this clause the word "without" is the equivalent of "if no such son". So, there is an equal argument for placing it before "without" to placing it after "death."

The Court further bases its conjecture as to the proper place on the statement of similarity to other clauses (R. 32). But there is no such similarity: The words "if George dies before his father" are wanting in all the other clauses (R. 5-8), and this destroys the similarity, and, so, none exists.

(c) *The Court below made its own punctuation to determine the application of six isolated, ambiguous words,— "if George dies before his father",—and reached its deter-*

mination that the devise was invalid on these six words (R. 31), *in conflict with testator's intent both as declared* (R. 5) *by him and appearing from the will as a whole* (R. 5-8), *contrary to the rule that,*—attention must not be confined to particular clauses or words of the will, and to the rule that the general intent is to be heeded as against doubtful and conflicting provisions. (Miller on Constr. of Wills, §11, p. 47, Note 2, p. 48, §17, p. 69, §18, p. 72; Thompson on Wills, §215, ps. 277, 278, §224, p. 291, §229, p. 300; 1 Page on Wills, 2nd Ed. §812, p. 1378, §821, ps. 1400, 1401; Douglas v. Blackford, 7 Md. 22, 23; Holmes v. Mitchell, 4 Md. 532, 535, 536; Slingluff v. Jones, 87 Md. 273).

(d) *The Court below held the devise of the remainder invalid to give effect to six isolated, ambiguous words* (R. 31), *overlooking the rule that,* (E. 6):

> "No effort to explain the words in a different sense can do so much violence to the clause as the total rejection of the whole bequest given in express terms to an only son." (Smith v. Bell, 6 Pet. 68, 79, 8 L. ed. 322.)

(e) *The Court below erred in holding that the remainder to Frank was contingent* (R. 33); *Whether a devise is vested or contingent depends on the intention of the testator as shown by the will as a whole, and*

> " an estate shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary." (Doe v. Considine, 6 Wall. 458; 18 L. ed. 869.)
>
> "The struggle with the Courts has always been for the construction which gives to the remainder a vested rather than a contingent character." (Croxall's Lessee v. Sherrerd, 18 L. Ed. 572, 579; 5 Wall 268-290). (See also 2 Alexander on Wills, §992, ps. 1436, 1437; 2 Page on Wills, 2nd Ed., §1110, ps. 1849, 1853).

Here, the intention of testator to give a vested remainder to Frank is shown by testator's express declaration, by the devising sentence itself (R. 5), and by the will as a whole. (R. 5-8.)

Even where no intention appeared to make the remainder vest, it has been many times held where the other facts were similar to those present here, that the remainder was vested. (2 Alexander on Wills, §992, ps. 1436, 1437; Tiffany, 2nd Ed., §142, ps. 510 to 513; 2 Page on Wills, 2nd Ed. §1116, p. 1862; 2 Jarman on Wills, 7th Ed., p. 1340; Johnson v. Washington Loan & T. Co., 224 U. S. 224).

(f) *The Court below erred in holding that the words "if George dies before his father" limited the devise to Frank, and not that to the unborn and never born great grandson.* (E. 1; R. 31.)

The Court's application of these words thwarts testator's intention to devise and his devise of the remainder to Frank, subject only to being divested if a great grandson had been born. (R. 5, 6.) This result should be avoided under many familiar and controlling rules of construction:

(1) The six isolated words are unnecessary for the declared purpose of devising the remainder and should not control the purpose. (Thompson on Wills, 2nd Ed., §230, ps. 300, 301);

(2) The result sought of making a valid devise should be preferred to and control the six isolated words, part of the language by which he sought to accomplish it. (1 Page on Wills, 2nd Ed., §812, p. 1379);

(3) A construction giving effect to the devise of the remainder is preferred to that making it invalid. (Miller on Constr. of Wills, §13, ps. 52, 53);

(4) Testator's plainly declared and predominant intention to devise the remainder (R. 5), shown also by the will as a whole (R. 5-8), will prevail over the six isolated and ambiguous words. (Miller on Constr. of Wills, §17, p. 69, §18, p. 72; 1 Page on Wills, §807, p. 1364, §821, ps. 1400, 1401; Thompson on Wills, §215, p. 278, §218, p. 281, §224, p. 291, §229, p. 300.)

(4-a) And it is very easy to hold the devise valid and to avoid all questions as to it by inserting "or" between the words "living" and "remainder" and transposing the six words, ("if George dies before his father"), so as to follow the "or"; or by omitting the six words, one of which courses, as the intent to devise the remainder is plain, the Court is justified in adopting, and it is submitted, should adopt, to give effect to testator's intent. (Farrar v. Bingham, 68 App. D. C. 93; 93 F. 2d 252). The result of either course would be to provide that the great grandson would have taken whether his father died before or after his grandfather, and the objection of the Court below to the construction urged by Appellants that the great grandson would take only if his father died before his grandfather (R. 31, 32), would be obviated.

The clause, amended as suggested, would read:

> "After the death of my son, Clifton, I devise the lot and warehouse on 7th Street, to his son George for life, if he be then living or if George dies before his father, remainder in fee to any eldest son George may have living, without such son, then remainder in fee to my son Frank."

(5) The only reason given by the Court below for its ruling is that the possible but never born great grandson was the first taker, and, therefore, to be preferred in construction to Frank, a favorite son (R. 31).

The rule as to the first taker collides with and its force is overcome by two more important and far better known rules,—

(1) That Frank, a child, far nearer in relationship than a great grandson would have been if born, is to be preferred because of his nearer relationship, and is not to be disinherited by conjecture or on dubious or ambiguous words, or through changing and supplying punctuation on extremely doubtful conjecture. (Thompson on Wills, §222, ps. 286, 287, 288; 1 Page on Wills, 2nd Ed., §817, ps. 1388, 1389); and (2), the other that "the law does not favor striking down gifts to the persons who were intended to receive them, and giving the property on a technicality to other persons, such as heirs or distributees, who were not intended to receive it." (Miller on Constr. of Wills, §13, p. 55.)

On the other hand,—(1) testator may well have intended not to give the remainder to the never born great grandson if his father survived his grandfather and both had life estates; (2) two lives in being are involved (and a trust until Joseph, the youngest son, became 21),—those of Clifton and George,—and not one, and testator, a lawyer, may well have believed that to avoid the Statute against perpetuities it was necessary to provide that the never born great grandson should be entitled to the remainder only if his father died before his grandfather. (Barnes' Heirs v. Barnes *et al.*, (3 Cranch, C. C. 269) 2 Fed. Cases, No. 1,014, p. 855; 48 C. J. §4, p. 937); (E. 5).

(3) The construction of the Court (E. 7) below involves implying the word "AND" between "father" and "without", (R. 30, 31), but "OR" can be well implied, and should be to save the devise, because these two words are implied whenever necessary to make a devise effective, but never to defeat it, and, here, the implying "AND", as the Court does, would, it is claimed, defeat the devise. The refusal to supply "or" is in conflict with the controlling authorities. (Roome v. Phillips, 24 N. Y. 463, 470; 2 Schuyler on Wills, 6th Ed., 874, 996, 997; 1 Jarman on Wills, 5th Ed. §483, ps. 517, 576, 577, 588, 589, 590; 2 Page on Wills, §1130, ps. 1882, 1883; 2 Alexander on Wills, §776, p. 1124; January v. Sprigg, 7 Gill. 197; Miller on Constr. of Wills, §32, p. 99; Thompson on Wills, §227, ps. 296, 297; Britton v. Thornton, 112 U. S. 526, 536.)

(4) The Court below erred in holding that the condition as to the remainder to Frank that George die without a son was precedent, and not subsequent (R. 31). It is a general rule that "an interest will be held to be contingent only if testator's intention is clearly shown. It will, accordingly, be presumed that conditions are subsequent rather than precedent", and, here, the intent of the testator to make this condition as to Frank's remainder subsequent is clearly shown. (2 Page on Wills, 2nd Ed., §1110, ps. 1849 to 1852; Miller on Constr. of Wills, §216, p. 596; Thompson on Wills, §375, p. 461; Craig v. Rowland, 10 App. D. C. 402, 417; statement as to evidences of intent near commencement of Point I hereinabove).

(6) The Court below erred in assuming, with no proof on the subject, that "Frank was otherwise", (than by this remainder), "amply provided for in the will" (R. 34). There was no evidence as to the value of the other property given to Frank.

III.

The opinion below holds that,

(1) The devise to Frank is invalid because the remainder to the imaginary great grandson is preferred to that of Frank, but this is not in issue here; no rights ever accrued to the imaginary great grandson, and they were extinguished on the death of George, leaving, however, the language of the clause as evidence of the devise to Frank (R. 31);

(2) The remainder to Frank was invalid and that it did not descend to the heirs at law, which is erroneous; (E. 8; R. 31) and

(3) That the remainder was bequeathed by the residuary clause to the residuary legatees, which decision also is erroneous, (id.).

(1) The opinion below holds that

The devise to Frank is void because, as found, (through substituting a period for a comma, and deciding by conjecture where the period should be placed, and giving controlling effect to six isolated, ambiguous words in conflict with the declared and general intent), the imaginary great grandson was the preferred taker as between him and Frank. (R. 31.)

Whereas the relative rights of Frank and the imaginary great grandson are not an issue here: The latter could become entitled to any rights only by being born, and he was not born. On the death of George, the possibility of any right accruing to him was extinguished, and the will

is to be considered as to him as if he had never been mentioned.

The words of the will are not stricken out but remain as evidence of intent,—not as intent as to the imaginary great grandson, but as intent as to Frank. Frank, a favorite son, remains as the only one to be considered, the only one of the two to whom the remainder was devised who can take, and the only one whom testator intended under the circumstances as they are to take it. (R. 5, 6.)

And the fact that the great grandson had not been born when the will was made, and might never be born, and that this was in the contemplation of testator, and that with this in mind, he provided that Frank should have the remainder if a great grandson was not born is clear and convincing evidence that testator intended Frank to have the remainder under the conditions which existed when the will was made, and which have not changed.

The determination that the remainder to Frank is invalid on a comparison with what might have been the right of the great grandson, (R. 31), if born, is obviously unfair, as the effect is to clothe the residuary legatees, (to whom the opinion holds the remainder passed, but who are not mentioned in and can claim no rights under the devising clause; R. 5, 6), with what might have been the rights of the great grandson; (*Id*).

> "She renounced everything given to her by the will, and as a consequence all devises and bequests to her were annulled. They ceased to have any operation and effect; and it was necessary to regard them as if they had never been mentioned in the will, so far as the widow's rights were concerned. But it is proper to read the entire will for the purpose of ascertaining the testator's meaning; and the devises and bequests

which had become inoperative by matter subsequent may serve to throw some light on the purposes, which the testator had in his mind at the time he made his will" (Small v. Marburg, 77 Md. ps. 11, 16, 17).

"Thus, if a devise be made to A, to be divested on a given event in favor of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the object of the substituted gift comes *in esse*, and answer the qualification which the testator has annexed thereto (1)." (Vol. 2 Jarman on Wills, 7th Ed. p. 1340).

(2) The holding of the Court that if the devise to Frank was invalid, the remainder would not pass to the heirs at law, is erroneous. (R. 31.)

(a) *It would so pass (if the devise was invalid), and testator would have died intestate as to the remainder, and this construction should be avoided.* (Miller on Construction of Wills, §159, p. 422; Galloway v. Galloway, 32 App. D. C. 76; Brown v. Wells, 45 App. D. C. 428; Presbrey v. Simpson, 53 App. D. C. 58; Marion v. Williams, 9 Mackey (20 D. C.) 20; Ridgely v. Ridgely, 59 A. 731, 100 Md. 230; Given v. Hilton, 95 U. S. 591).

(b) *The remainder, if invalid, did not become a reversion.* (E. 9.)

Testator died in 1867. George did not die until 1936. The Court's holding is that this remainder was in abeyance between these two dates, for 69 years,—two-thirds of a century. (R. 29, 30.)

A reversion could arise only by construction, and

"The law does not favor the abeyance of an estate and never allows it to arise by construction or implication." (Doe v. Considine, 6 Wall. 458.)

(3) The Court below erred in holding that the residuary clause embraces the remainder devised to Frank. (E. 8; R. 31.)

The residue is that of personalty only; testator says:

> "The residue of my estate * * * shall, * * * be *paid* to him and the *balance* shall be divided." (R. 8.)

The remainder involved here could not be "paid" to anyone. Nor could there be a "balance" of it.

Not only is the residuary clause confined to personalty by its language, but testator intentionally and necessarily so limited it because his real property had been otherwise devised.

It is held that even where testator had specifically devised all his real estate, but included it also in the residuary clause, that it did not pass thereby. We quote:

> "In Plummer v. Shepherd, 94 Md. 466, 468, 470, the testatrix gave 'all my real estate' to certain persons, and then gave furniture and sums of money to some of the same persons and then provided that 'the rest and residue of my property, real and personal, I give to all my heirs herein named'. Thus although all of the real estate had been previously devised, yet in the residuary clause the testatrix undertook to dispose of the residue of her real estate. It was held that the word 'residue' as to the real estate was merely precautionary to meet any omission of her real estate, and the 'residue' was intended to apply only to the personal estate."
>
> (Miller on Constr. of Wills, Note 5, §59, p. 171, and also, §59, ps. 168 to 171.)

The Court below was obviously misled in holding that the remainder devised Frank passed under the residuary clause by falling into the following mistaken conjecture:

> "Furthermore, it may be that the testator had in mind the probability that division of the residue among the various beneficiaries would entail sale of any realty contained in it and payment in money to Walter and the others." (R. 33.)

On the contrary, the testator expressly provided as follows as to his improved real property:

> "I prohibit the sale of real estate, hereinafter devised, upon conditions and limitations, with remainders and reversions over, by the order, or decree of any Court, in The District of Columbia and County of Washington, sitting in Equity, or otherwise, as I am authorized to do, by the Act of Congress * * *." (R. 5.)

How a decree of sale could have been made in face of this provision in a mystery.

IV.

Making the devise to Frank depend on the time when George died would be "a purely arbitrary selection" under the wording of this will, and such an interpretation would not be a sensible one, (E. 1, 2) and should be avoided.

A testator created life estates and upon their termination directed certain real property to be sold, and the proceeds distributed "among my daughters living at my death, and their children and descendants *(per stirpes).*" As there was no direct gift of the property to the beneficiaries, but merely a direction that after the termination of the preceding life estates, the proceeds of the sale should be divided between certain beneficiaries, under an established rule only those described who survived till the time of distribution would participate, but it was held that to deprive the descendants of a beneficiary who died between

testator's death and the time of distribution would be "a purely arbitrary selection," not required by the language used and would not be sensible, and the rule for these reasons was not enforced. (Johnson v. Washington, L. & T. Co., 224 U. S. 224.)

Here, respondent's contention is similar to that in the case cited,—that Frank's remainder is made invalid by George's dying after and not before his father. Not alone is the principle involved the same here as in the case cited, but here there are many circumstances which show that "the words do not forbid a different interpretation",—that "the language * * * is not of this imperative character",—but that testator intended Frank's devise to stand notwithstanding the words used: (1) He declared his intention to make the devise to Frank (R. 5, 6); (2) he devised it to Frank subject only to divesting if a great grandson were born (R. 6); (3) he included in the residuary clause only personal property (R. 8); and (4) in the other ten similar clauses he made the devise of the remainder to a child subject only to an eldest son surviving the life tenant. (R. 5-8.)

As the great grandson was never born and Frank was the only other person mentioned in the devise, the only way the devise and testator's intent can be given effect is by holding the devise to Frank valid.

As the intent is plain, the Court will give it effect. (Finlay v. King, 3 Pet. 346.)

Conclusion.

This Court, the Federal Courts generally, and all the State Courts have unanimously held throughout the history

of the country that the intention of the testator controls in the construction of wills; that the duty of the Court is to discover that intention and to give it effect. The Court below gave no weight whatever to testator's intention, expressly declared and shown also by his will as a whole, but states that its decision is based on substituting a period for testator's comma, and by placing the period by conjecture, resulting in holding the devise of the remainder void. It would unsettle the firmly established, wise rule that the testator's intention shall control in the construction of wills to have such a decision as that made here by an important Court of Record stand.

Restating the doctrine of intention is not alone in the interest of appellants, but will act as a salutary check on attempts to substitute conjectural punctuation for testator's intention in the construction of wills, and preclude a large volume of ill-considered and useless litigation.

We respectfully submit that this Petition should be granted.

S. WALLACE DEMPSEY,
BRUCE FULLER,
Attorneys for Petitioners,
723 Investment Building,
Washington, D. C.